No. 96-474 (3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

PACIFIC LUMBER COMPANY,

Petitioner,

vs.

MARBLED MURRELET, (Brachyramphus marmoratus); ENVIRONMENTAL PROTECTION INFORMATION CENTER,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Case No. 95-16504

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QUESTIONS PRESENTED

Should this Court revisit the harm regulation under the Endangered Species Act, 50 C.F.R. § 17.3 (1994) where the district court found that logging in Owl Creek will actually kill or injure marbled murrelets using the forest for breeding, petitioner failed to present this argument in the district court, and the case upon which it relies, *Babbitt v. Sweet Home Chap. of Communities for a Great Oregon*, ___ U.S. ___, 115 S. Ct. 2407 (1995), is not a change in the law?

Should this Court review petitioner's contention that prospective habitat modification that will actually kill or injure protected wildlife cannot be enjoined unless an identifiable member of the protected species has already been killed or injured, where petitioner failed to present this argument in the district court and the case upon which it relies, *Sweet Home*, did not change the relevant law?

Should this Court review a challenge to the *sufficiency* of respondents' scientific evidence under standards for the *admissibility* of such evidence set forth in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), where petitioner failed to object to the admissibility of respondents' substantial scientific evidence at trial?

RULE 29.6 LIST

Respondent Environmental Protection Information Center is organized under I.R.C. § 501 (c) (3), and has neither parent nor subsidiary organizations.

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SUMMARY OF ARGUMENT

Petitioner seeks review of certain legal issues that purportedly arose during an eight-day trial under the Endangered Species Act, after which the district court found that petitioner's logging operations in Owl Creek forest would harm marbled murrelets, a secretive seabird that is threatened with extinction and that depends upon the forest for nesting, reproduction and its very survival.

The district court found that marbled murrelets nest in a 237-acre portion of the Owl Creek known as THP[1]-237 and that proposed future logging would actually kill or injure them by significantly impairing their ability to breed and survive. It also found that past logging had caused a significant disruption of murrelets' normal behavioral patterns, which was "clearly demonstrated by the precipitous decline in marbled murrelet detections at THP – 237 in July 1992, after Pacific Lumber conducted logging operations at the beginning of what should have been the peak period for marbled murrelet detectability." Finding 101, Ap. 93a. Based on all of the evidence, the district court enjoined petitioner, owner of nearly 200,000 acres of Northern California forest land, from further logging in THP-237 until it obtains permission to do so from the federal government under the Endangered Species Act.

None of the questions on which petitioner seeks review in this court was preserved in the district court. As for the two questions involving the harm regulation, petitioner did not ask the district court to determine respondents' entitlement to relief under the legal standards it now claims are controlling, did not argue those standards to the district court during trial, did not request any findings under those standards, did not object to the district court's finding of fact on these grounds after the court entered them, did not move for reconsideration, and did not take any other step during or after trial to give the district court an opportunity to rule on these questions.

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[1] "THP" is the acronym for timber harvest plan.

As to the evidentiary issue, petitioner does not assign error to the admission of any evidence and does not state where in the record any such objection to admission was made and ruled on. Nor does petitioner argue that the admission of evidence over a properly framed objection was prejudicial or that it affected a substantial right of a party, as required by Fed. R. Evidence 103(a). In short, none of these issues has been properly presented for review by this Court.

In addition to petitioner's failure to preserve these claims properly, its claims are without merit. Its first question misrepresents the record and ignores the Findings. The evidence did not establish merely "possible future impairment to the species as a whole," as petitioner contends. The lower detection rates of murrelets following petitioner's clandestine logging operation in THP-237 in 1992, Finding 55, Ap. 69a, and Finding 101, Ap. 93a, establish that past logging had already killed or injured murrelets using the forest for nesting purposes "by significantly impairing [their] essential behavioral patterns, including breeding . . . " 50 C.F.R. § 17.3 (1994). Moreover, the district court found that petitioner's proposed logging operations in THP-237 would harm marbled murrelets nesting in Owl Creek by "the destruction and degradation of occupied habitat, such that marbled murrelets will actually be killed or injured by the logging operations or through significant impairment of their essential behavioral patterns." Finding 95, Ap. 90a. The evidence clearly satisfied the requirements of 50 C.F.R. § 17.3 and this Court's interpretation of that regulation in *Sweet Home*.

The second question presented proposes that courts may not enjoin imminent violations of the Endangered Species Act unless a violation has already occurred. In petitioner's view, no matter how certain the proof that protected wildlife will actually be killed or injured in the future, courts are powerless to prevent that harm absent proof that the violator has already killed or injured one or more particular members of a protected species. This construction of the Endangered Species Act is antithetical to decisions of this Court and to the plain meaning and legislative history of the statute, and would

lead to the absurd result that an endangered species could be wiped out before legal action could be taken to protect it.

The third question presented challenges the sufficiency of the evidence to support the trial court's finding of harm under this Court's opinion in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 509 U.S. 579 (1993). However, *Daubert* did not establish a standard for weighing scientific testimony after it is admitted and did not change the standard for reviewing the sufficiency of evidence to support factual findings challenged on appeal, i.e., the clear error standard under Fed. R. Civ. P. 52(a). Using the proper standard, respondent's evidence from preeminent murrelet scientists is not just adequate to support the judgment – it is overwhelming.

The petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

A. Statement of Facts.

The marbled murrelet has made its way from obscurity to the focus of attention by this Court because petitioner's proposed logging operation in Owl Creek "will result in the destruction and degradation of occupied habitat, such that marbled murrelets will actually be killed or injured by the logging operations, or through significant impairment of their essential behavioral patterns." Finding 95, Ap. 90a. This finding, which fits squarely within the harm regulation, 50 C.F.R. § 17.3 (1994),[2] is the culmination of a series of

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[2] The regulation provides:

> *Harm* in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3 (1994).

unchallenged factual findings that support the issuance of an injunction against logging in Owl Creek.[3] Ap. 38a-97a.

The court based its findings on two principal sources of evidence: (1) Pacific Lumber's own surveys of the murrelet in Owl Creek, which the court found were "administered- . . . with the intent to either avoid detecting marbled murrelets or . . . to grossly understate the marbled murrelets' presence" in the area to be logged. Finding 82, Ap. 80a; and (2) the opinions of four independent scientists – a member of the Marbled Murrelet Recovery Team appointed by the United States Fish and Wildlife Service, two biologists employed by California's wildlife agency, and a university biologist who co-authored the benchmark scientific protocol for evaluating marbled murrelet forest use and occupancy. These scientists collectively testified that murrelets depend on the Owl Creek forest for breeding and that the proposed logging will seriously injure them, damaging their ability to breed and survive as a species.[4]

Petitioner's statement of facts is based largely on references to the trial transcript, some of which float free of context. It ignores the district court's review of the evidence, assessment of the credibility of witnesses, and exhaustive factual findings set forth after an eight-day trial on the merits in 105 numbered paragraphs in its decision at Ap. 38a-97a. Lacking space to address all of the inaccuracies in petitioner's statement, respondents incorporate the district court's findings into this statement of facts. *Id.*

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[3] Both petitioner and amicus curiae Pacific Legal Foundation convey the impression that the injunction will forever deprive petitioner of the right to harvest the Owl Creek stand (Petition for Certiorari at 4; Amicus Curiae Brief at 5). This impression is false. Petitioner can seek to have the injunction lifted if it can either (a) show through reliable surveys that THP-237 is not occupied by marbled murrelets, or (b) obtain approval of an Habitat Conservation Plan ("HCP") in accordance with 16 U.S.C. § 1539(a)(2). Finding 105, Ap. 94a-95a n. 45.

[4] The district court specifically rejected contrary findings proposed by Pacific Lumber after finding that its experts were not credible. ER 119; Finding 90, Ap. 88a-89a.

The marbled murrelet was listed by the Secretary of Interior as a "threatened" species under the Endangered Species Act – that is, a species "in danger of extinction within the foreseeable future through all or a significant portion of its range." 16 U.S.C. § 1532, Finding 2, n. 4, Ap. 41a.[5]

The current status of the species is more precarious than even its federal listing, as "threatened" with extinction, suggests. The trial court found:

> . . . Because of the precarious state of the marbled murrelet population, the destruction of any significant amount of marbled murrelet habitat will result in a high probability that the Northern California population will become extinct. . . . Unless the marbled murrelet population is kept at a sustainable level, *without further loss of habitat*, it is very likely that the marbled murrelet will slip toward extinction.

Finding 16, Ap. 47a (emphasis supplied).

The district judge discussed in detail the nesting characteristics and biology of the marbled murrelet at Findings 6 – 17, Ap. 42a-48a. Murrelets spend most of their lives at sea, but they fly inland to breed and nest exclusively in old-growth forests within 30 miles of the coast in northern California. Finding 7, Ap. 43a. There is one reason, and one reason only, why murrelets are found within these forests: breeding. RT 172. These old growth forests contain redwood and Douglas fir trees that are centuries old, hundreds of feet tall, with trunks that are from two to ten feet in diameter. *Id.* The female murrelet lays a single egg each year in a natural depression on a large horizontal, moss-covered limb of such a tree, generally more than 150 feet above the forest floor. Findings 7-8, Ap. 43a.

With an historical population of 60,000 in California, now there are fewer than 5,000 murrelets. Finding 13, Ap.

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[5] The murrelet is listed as "endangered" under the California Endangered Species Act. *Id.*

45a. The reasons for this precipitous drop in murrelet population are (1) the bird's low annual reproductive success; and, (2) the destruction of more than 96% of its nesting habitat as a result of commercial logging during the last 150 years. Finding 14, Ap. 46a. This finding shows that commercial logging in forest habitat historically used by murrelets for nesting has killed or injured individual murrelets by impairing their ability to breed and by preventing chicks from being born or from surviving to adulthood.

Owl Creek is important nesting habitat for the marbled murrelet. The Marbled Murrelet Recovery Team appointed by the United States Fish and Wildlife Service recommended that suitable nesting habitat, in an area which includes Owl Creek and THP-237, be designated as critical habitat.[6] Findings 17-18, Ap. 48a-49a. While petitioner acknowledges that Owl Creek is suitable nesting habitat, it fails to mention the district court's findings that *murrelets use Owl Creek for nesting*, Finding 79, Ap. 78a, and that *marbled murrelets are in fact nesting in THP-237*. Finding 74, Ap. 76a.

Petitioner proposes to do a two-step clear cut in THP-237. Finding 25, Ap. 52a. The district judge found that petitioner's proposed logging in THP-237 "will result in the destruction and degradation of occupied habitat, such that marbled murrelets will actually be killed or injured by the logging operations, or through significant impairment of their essential behavioral patterns." Finding 95, Ap. 90a. RT 108-111 (Carter testimony); RT 285, 302-307, 377-380 (Nelson testimony); RT 632-638, 640-641, 656-660, 786-789, 817-818 (Moore testimony), and; RT 991-995, 1000 (Burkett testimony). Therefore, the court enjoined logging in THP-237 until such time as petitioner can prove that murrelets do not occupy THP-237 or until petitioner receives approval for an

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[6] The Owl Creek forest, of which THP-237 is a part, is an island of suitable murrelet habitat "completely surrounded by previously harvested clear cut and second growth forests for four to five miles in all directions." Finding 18, Ap. 49a.

HCP for the murrelet in accordance with 16 U.S.C. § 1539(a)(2). Finding 105, Ap. 94a-95a and n. 45.

B. Proceedings Below.

The whole premise of petitioner's defense against enjoining logging in Owl Creek was its claim that marbled murrelets are rarely present in that forest and that they do not use THP – 237 for nesting. Before moving to the legal arguments, it is well to examine this "discredited claim", Finding 90, Ap. 89a, which flies in the face of overwhelming evidence.

1. Petitioner's Manipulation Of The Scientific Data.

The California Department of Forestry refused to approve THP-237 because the plan did not include sufficient mitigation measures to ensure that a taking of murrelets would not occur in violation of the California Endangered Species Act. Finding 21, Ap. 50. Petitioner appealed this refusal to the California Board of Forestry, which approved THP-237 on March 13, 1992. Finding 22, Ap. 51a. The Board of Forestry's approval was contingent, however, upon petitioner's conducting marbled murrelet surveys in Owl Creek in compliance with the Pacific Seabird Group's, *Methods for Surveying Marbled Murrelets at Inland Forested Sites* ("PSG Protocol") and sharing its survey results with the California's Department of Fish and Game to ensure that no "take" of the marbled murrelet would occur. *Id.*

Thereafter, petitioner gathered data on the occurrences of murrelets in Owl Creek. However, petitioner withheld important data from the regulators and respondents, and falsified or altered some of the data that it did provide.[7] The trial judge

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[7] On the second day of trial, petitioner revealed for the first time that it kept two sets of books, and produced for the first time the "original[s]" which were found in the "closet at home" of one of its experts. Finding 84, Ap. 82a. Only the second set of books had been turned over to the California forestry regulators, Findings 83-84, Ap. 81a-82a, and to respondents during discovery. Pl. Ex. 292. After petitioner produced the

found several instances where murrelet surveyors who had made important detections of the birds were interrogated by their supervisors "under circumstances that appear to have been calculated to persuade the surveyors to change or delete marbled murrelet detections that were contrary to Pacific Lumber's interests." Finding 71, n. 35, Ap. 74a-75a; Finding 82 (g), Ap. 81a.[8]

From this and other evidence, the district court concluded that "Pacific Lumber administered its marbled murrelet surveys at THP-237 *with the intent to either avoid detecting marbled murrelets or, to the extent that making detections could not be helped, to grossly understate the marbled murrelets' presence in THP-237.*" Finding 82, Ap. 80a-81a (emphasis added).

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original books during trial, the district judge made an express finding that petitioner or its contractors had selectively copied data from the originals onto the second set of data sheets and had deleted or altered data that were pertinent to the detection of marbled murrelets. Findings 85-86, Ap. 82a-84a.

[8] For a particularly egregious example, where a surveyor's detection of murrelet behavior in close proximity to a nest in Owl Creek was recorded on the original sheet but was eliminated entirely from the second set of books supplied to the regulators in connection with THP-237 and to respondent during discovery in this case, see Finding 50, Ap. 65a-66a. In that instance, murrelet surveyor David Fortna recorded on the original sheet that he had heard a murrelet "jet sound" – the sound made by a murrelet when it dives from altitude into a nest tree. Id.

> In fact, observations of marbled murrelets flying into a nest tree are considered to be so important that the PSG Protocol recommends that they be reported immediately to interested scientists and responsible wildlife agencies. Pacific Lumber, however, never reported Fortna's detection to anyone. (Citation to record and footnote omitted.)

Id. Pacific Lumber's Chief of Forestry, Ray Miller, claimed that the original Fortna survey sheet recording the jet sound was "lost". Finding 50, n. 29, Ap. 66a. The California Department of Fish and Game was *never* told about the existence of this very significant detection. Finding 83, n.38, Ap. 81a-82a.

In addition to altering and falsifying field data, petitioner attempted to minimize the importance of Owl Creek to the survival of the marbled murrelet by hiding a key habitat map contained with its draft habitat conservation plan (HCP). When petitioner's experts, contributors to the HCP, denied that the area of the proposed logging in THP-237 was suitable marbled murrelet habitat (Finding 80, Ap. 78a), one of them was ordered on the next to the last day of trial to produce a map which had been redacted from the HCP which proved precisely the *opposite*: that THP-237 contained "some of the most suitable and important nesting habitat for the marbled murrelet on the 196,000 acres of land owned by [petitioner] in Humboldt County, California." Finding 20, Ap. 49a; Pl. Ex. 329 and 334.[9] For these and other reasons reflecting their misconduct and bias, the district court found that petitioner's experts "lacked objectivity and credibility." Finding 87-89, Ap. 84a-88a. Furthermore, the trial court found that their trial testimony "contradicted the generally accepted scientific knowledge about the marbled murrelet." Finding 89, Ap. 88a.

2. Petitioner's Surreptitious Logging In THP-237 In June, 1992, Injured Marbled Murrelets

Despite petitioner's efforts to minimize or hide its detections of murrelets, there were 70 detections at numerous locations in and around THP-237 between April 17 and June 16, 1992. Finding 42, Ap. 61a. These included 16 detections in the proposed harvest area itself. *Id.* Although required to do so, petitioner did not provide the original data sheets of all of those detections to California's Department of Fish and

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[9] Petitioner's two experts, Steve Speich and Steve Kerns, had helped prepare the draft murrelet habitat conservation plan for petitioner. Finding 76, n. 37, Ap. 76a. At trial, Kerns claimed that Owl Creek and THP-237 had not been ranked for their suitability as murrelet habitat in HCP maps. RT 1535-1536. Speich acknowledged that he had received, prior to his deposition, a subpoena duces tecum requesting all maps in the HCP, but that he did not produce them because he and petitioner's lawyers unilaterally decided that those would be off limits. RT 1774.

Game to ensure that a "take" of the murrelet would not occur during harvesting. Finding 83, Ap. 81a. Instead, on June 19-23, 1992, petitioner "surreptitiously logged THP-237." Finding 83, Ap. 82a; Finding 54, Ap. 68a. Many of the areas logged were immediately adjacent to survey stations where detections of marbled murrelets had previously been recorded.[10] Finding 54, Ap. 68a-69a.

The state Department of Fish and Game requested that the survey be resumed in THP-237 after the June 1992 harvest. Finding 55, Ap. 69a. Despite the fact that July is the "peak level of high activity" for murrelets in the forest, Finding 51, Ap. 67A, there were only six detections in the month after the harvest, none in the areas that had been logged. Finding 55, Ap. 69a. The dramatic drop in detections during the month of peak murrelet activity in the forest establish that petitioner's logging activities in June 1992 actually injured murrelets using THP-237 for nesting by either killing them outright or significantly impairing their breeding, an essential behavior.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT DID NOT EXPAND THE SCOPE OF THE HARM REGULATION BUT MERELY UPHELD THE DISTRICT COURT'S FINDING OF HARM UNDER THE REGULATION.

Petitioner asserts that the district court issued, and the circuit court affirmed, an injunction based solely upon findings that the proposed harvest would result in a substandard habitat for the murrelet which, in turn, would decrease the

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[10] There were numerous observations of "occupied behavior" by marbled murrelets in and around THP-237 between 1992 and 1994. Finding 77, Ap. 77a. Under the PSG Protocol, which, the district court expressly found, met the requirements for reliable and relevant scientific evidence under *Daubert*, Finding 26, n. 15, Ap. 52a-53a, observations of "occupied behavior" by marbled murrelets in suitable habitat means that the birds are probably using a stand for nesting purposes. Finding 35, Ap. 57a.

chances of successful mating and the likelihood that some murrelets would find nest sites. It argues that such findings are insufficient to support issuance of an injunction because the harm regulation is limited to habitat modification that actually kills or injures particular, identifiable wildlife. Petition for Certiorari, 7-8. This argument was never raised in the district court and, in any event, misrepresents the findings of the trial court and distorts the holding of the circuit court.

A. Petitioner Has Not Preserved The Question Presented.

The first and second issues presented for this Court's review overlap considerably in that they both fault the district court for issuing, and the circuit court for upholding, an injunction without adequate proof of actual death or injury to one or more particular members of an endangered species. Since the *second* issue presented in reality was the principal ground upon which appeal was taken to the circuit court, respondents will address the waiver issue more completely in Section II, A, *infra*. at 15.

It should be stated at the outset, however, that petitioner can point to no place in the trial court record where it challenged the court's harm finding as being overly vague or inadequately linked with injury to one or more particular murrelets. The reason is simple: petitioner itself did not differentiate in the district court between harm "to particular members of an endangered species" and "harm to the species as a whole." If petitioner had raised the issue at the district court level, the district court could well have made additional specific findings since it is clear from the findings it did make that in its view, birds in the specific population occupying THP-237 would be actually harmed by the logging.

B. The Record Does Not Raise The Issue Presented: Petitioner Has Misrepresented The District Court's Findings.

Neither the district court nor the circuit court read the requirement of actual death or injury out of the harm regulation. Rather, petitioner reads the finding of actual death or injury out of the trial court's factual findings.[11] The district court found that the proposed logging in THP-237 would destroy and degrade "occupied habitat" and that, as a result, "marbled murrelets *will actually be killed or injured*." Finding 95, Ap. 90a. (Emphasis added). They will be killed or injured in either of two ways: directly ("by the logging operations themselves") or indirectly ("through significant impairment of their essential behavioral patterns"). *Id.* Ap. 90a-91a.

Characterizing THP – 237 as "occupied," Finding 95, Ap. 90a-91a, sufficiently identifies the population of marbled murrelets that will be injured or killed by the proposed logging. There were numerous detections of "occupied behavior" by marbled murrelets in the area of THP-237 during the three years of Owl Creek surveys. Findings 34-36, 42, 44-51, 54, 58, 59, 64, 68, 70, 71, 74 and 95, Ap. 57a-91a. "Observations of 'occupied behavior' indicate that marbled murrelets are probably using a stand for nesting purposes." Finding 35, Ap. 57a. Since marbled murrelets return each year to the same stand for nesting, Finding 9, Ap. 44a, the population that will be affected by the proposed logging consists, at the very least, of those marbled murrelets that were observed using the area of THP-237 for nesting purposes between 1991 and 1994.

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[11] The following statement is typical of petitioner's efforts to marginalize the trial court's factual findings:

> "Despite prolixity, the district court's findings here amount to no more than a conclusion that, due to the reduced size of a potential nesting area, an unspecified number of birds will 'likely' not be able to nest as successfully as in the past or may not nest at all."

Petition for Certiorari at 9.

The trial court also related the impact of the proposed logging on the Owl Creek population to the survival of the northern California population of marbled murrelets:

> . . . Pacific Lumber's implementation of THP-237, which calls for immediate removal of 40 to 60 percent of the old-growth redwood and Douglas fir trees in the proposed harvest area, will significantly impair the marbled murrelets' breeding behavior and decrease the chances of successful nesting. . . . Moreover, the harvesting of THP-237, or any other significant portion of the marbled murrelets' critical nesting habitat in southern Humboldt County, *will result in a high probability that the remaining population of marbled murrelets in this region will become extinct*. . . . The survivability of the marbled murrelet populating utilizing Owl Creek is important to the survivability of the entire California marbled murrelet population, because the loss of this population will result in the loss of the marbled murrelet population throughout a significant portion of its range.

Finding 95, Ap. 90a-91a. (Emphasis added) This is not, as petitioner contends, a finding of "some abstract 'harm' to the species as a whole." Petition for Certiorari at 8. Rather, it was a specific harm (significant impairment of essential behavior – namely, nesting in the Owl Creek stand) to specific, identifiable members of a species of endangered wildlife (marbled murrelets that had been observed using the area of THP-237 for nesting) which also had dire consequences for a larger population of the species (the southern Humboldt County population of marbled murrelets).

These findings do not ignore the harm regulation's requirement of actual death or injury. To the contrary, they are based on and meet that requirement. It is these findings, not the statements petitioner attributes to the trial court,

which the circuit court held were sufficient to establish "harm" under the regulation and *Sweet Home*.

C. The Ninth Circuit Did Not Ignore The Requirement Of Actual Death Or Injury In The Regulation Nor Did it Expand the Definition; Like The Trial Court, It Simply Applied The Language Of The Regulation to the Facts Proved at Trial.

Petitioner's argument in support of its first reason for granting the writ is directed at the following sentence in the Ninth Circuit's discussion of *Sweet Home*:

> Thus, under *Sweet Home*, a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to "harm" under the ESA.

Petition for Certiorari at 17a (emphasis added). Contrary to petitioner's argument, this sentence does not misinterpret *Sweet Home* in either of the respects alleged.

While the circuit court in that sentence speaks of a protected species rather than its members, the sentence must be interpreted in light of the findings whose sufficiency was under consideration – namely, the trial court's finding of actual death or injury, in the future, to members of a protected species that would result from implementation of the harvest plan. Reading that phrase in context with the remainder of the court decision makes it clear that the circuit court had actual injury and deaths to specific birds in mind: the population of birds occupying the Owl Creek THP-237.

The circuit court specifically refers to the evidence in the district court that there were: " 'approximately 100 detections of marbled murrelets at Owl Creek, throughout the birds' breeding season, for a period of three consecutive years,' including many instances of 'occupied behavior. . . . ' In addition, several experts testified to the probability of the murrelets' nesting in Owl Creek, and that implementation of Pacific Lumber's harvesting plan would likely harm marbled murrelets by impairing their breeding and increasing the likelihood of attack by predators on the adult murrelets as well as

the young." Petition for Certiorari at 17a-18a. Thus, the circuit court plainly did not ignore the requirement of actual death or injury in the regulation's definition of harm, nor did it apply the requirement abstractly to the species as a whole.

Petitioner's out of context quotation from the circuit opinion also ignores the fact that the regulation itself defines actual death or injury to include significant impairment of essential behavioral patterns of protected wildlife, including sheltering or feeding.

While quoting with approval from a portion of Justice O'Connor's concurrence in *Sweet Home*, Petition for Certiorari at 9, petitioner fails to quote her statement about the importance of that sentence from the harm regulation:

> Breeding, feeding and sheltering are what animals do. If significant habitat modification, by interfering with essential behaviors actually kills or injures an animal protected by the Act, it causes "harm" within the meaning of the regulation.

115 S.Ct. at 2419.

What the district court found, and the circuit court affirmed as sufficient to constitute harm under the regulation, is that the proposed logging would result in actual death or injury to murrelets that use the THP-237 area for nesting purposes by significantly impairing their breeding and nesting behavior. Far from departing from the harm regulation, both courts followed its requirements, as discussed in *Sweet Home*.

II. THE INJUNCTION WAS PROPERLY BASED ON PAST HARM AND AN IMMINENT THREAT OF FUTURE HARM TO INDIVIDUAL MURRELETS NESTING IN OWL CREEK AND ELSEWHERE.

A. Petitioner Has Not Preserved The Question Presented To This Court.

In this court, petitioner contends that the decision to issue an injunction was improperly based on harm "to the

species as a whole as opposed to an identifiable animal . . . " Petition for Certiorari at 11. This is markedly different from, although related to, the position it took in the circuit court, where petitioner contended that evidence of future harm was legally insufficient for issuance of an injunction under the ESA, absent proof of a past or concurrent death or injury to a protected species. Appellant's Opening Brief, 12-15. In any event, petitioner did not present either of these contentions to the trial court. Therefore, they are waived.

On the question of what must be proved before proposed habitat modification may properly be enjoined under section 9 of the Act, petitioner's position on appeal is in direct contradiction to its position at trial where, moreover, no differentiation was made between harm to the species as a whole and harm to individual members. At trial petitioner argued only that logging in THP-237 could not be enjoined unless the evidence established that the logging *would, in the future*, kill or injure marbled murrelets. In its trial memorandum, petitioner invited the district court to evaluate respondents' evidence of harm in light of the following standard:

> [Respondents] must show the birds rely on the harvest area to breed successfully. [Respondents] must also show that, as a result of the harvest, presently living birds *will* die or fail to complete acts necessary to the maintenance of the species. [Respondents] must show how the death *will* occur or, if "essential acts" are involved, how the essential acts *will* be interfered with . . .

Defendant's Trial Brief (CR 182) at 7 (emphasis added). Far from arguing that proof of future harm was insufficient to support an injunction, or that harm must be to one or more particular animals, petitioner invited the district court to make the following specific findings of fact:

> 20. No living murrelet *will* actually be killed or injured nor *will any future essential behavior* of any murrelet *be affected* significantly by the proposed harvesting.

> 21. The proposed selective harvest in – 237 *will* not prevent or retard the recovery of the species, much less cause its extinction.
>
> . . . .
>
> 25. No birds present during the proposed harvesting *will* be significantly affected by it.

Defendant's Proposed Findings of Fact (June 14, 1994) (CR 181) at 5 (emphasis added). Similarly, citing the definition of "harm" in 50 C.F.R. § 17.3, petitioner argued at the close of evidence that "the plaintiff must prove that the habitat modification *will* actually kill or injure marbled murrelets." Defendant's Closing Brief (CR 228) at 2 (underlining in original, italics added). Again, no mention was made of the distinction between harm to one or more particular birds and harm to the species as a whole, despite the fact that this very issue had previously been discussed within the circuit in *Palila v. Hawaii Dep't of Land & Natural Resources*, 649 F. Supp. 1070, 1075, 1077 (D. Hawaii 1986).

Petitioner did not ask the district court to determine respondents' right to an injunction under the legal standard it now espouses or give that court an opportunity to rule on the questions being raised in this court. Accordingly, petitioner waived the contention that an injunction may be issued to prevent future harm to a protected species only upon a showing that one or more particular members of a protected species have actually been or are currently being killed or injured.

As a general rule, federal appellate courts do not consider issues not passed on below, although they have power to do so. This Court leaves the decision of whether to address an unpreserved issue raised primarily to the discretion of the circuit court, to be exercised on the facts of individual cases. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976); *Hormel v. Helvering*, 312 U.S. 552, 557-59, 61 S.Ct. 719, 721-22, 85 L.Ed. 1037 (1941). In the Ninth Circuit, there is an exception to the general rule precluding review of an unpreserved issue when the issue arises from an intervening change in law that occurs after trial. *See,*

e.g., *Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985). The rationale of this exception is evident: an issue arising from a change in the law after trial could not have been presented at trial.

In the circuit court, petitioner relied heavily on *Sweet Home* to support its contention that an injunction may be issued to prevent future harm to protected wildlife only upon a showing of past or concurrent harm to particular members of a protected species. Because *Sweet Home* was decided after entry of judgment in this case, the circuit court exercised its discretion to review the merits of petitioner's contention. In so doing, it abused its discretion. This Court should not compound that error by granting the writ.

This review was unnecessary because the change-in-law exception does not apply here. In its opening brief in the circuit court, petitioner asserted that the test for entitlement to injunctive relief is set forth in "the plain language of the section [i.e., 16 U.S.C. § 1540(g)(1)(A)]," Appellant's Opening Brief at 12, and in "cases interpreting similar language" in the citizen suit provisions of other environmental statutes. *Id.* at 13. Petitioner noted that section 505 of the Clean Water Act, 33 U.S.C. § 1365(a)(1), is similar to section 11 of the Endangered Species Act in providing that "any citizen may commence a civil action . . . against any person . . . who is alleged to be in violation of . . . " relevant standards or orders promulgated under the Act. It then cited the holdings in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 57, 108 S.Ct. 376, 98 L.Ed.2d 307 (1987), and *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 395 (5th Cir. 1985), for the proposition that the complaint in a citizen suit must allege that a violation *has occurred or is occurring* when the complaint is filed. Appellant's Opening Brief at 13-14. These admissions demonstrate that petitioner could have raised the question in the district court before *Sweet Home* was decided. The fact the *Sweet Home* was decided after trial neither explains nor excuses petitioner's failure to do so.

Furthermore, *Sweet Home* did not change the law but merely upheld a regulation that had been the law since

1975.[12] *Sweet Home* involved a facial challenge to the definition of "harm" in the regulation. ___ U.S. at ___, 115 S.Ct. at 2414. The Court upheld the "harm" regulation, specifically including habitat modification, finding it to be within the scope of takings prohibited by section 9 of the Endangered Species Act, as the regulation provides. ___ U.S. at ___, 115 S.Ct. at 2410. Significantly, the showing that must be made to enjoin harm was not at issue in *Sweet Home*. The Court neither addressed nor decided it, much less held that proof of *past* or *concurrent* harm to protected wildlife was required. Therefore, *Sweet Home* neither changed nor made any law on this point.

At the time of trial, petitioner was fully capable of arguing that, since habitat modification is "harm" within the meaning of the regulation only if it "actually kills or injures wildlife," habitat modification may be enjoined only upon a showing of past or concurrent death or injury to identifiable members of a protected species. Petitioner's failure to present that argument at trial prevented development of a full factual record on the harmful effects of its past logging in Owl Creek. The district court applied the test of harm that petitioner invited it to apply and found from the evidence that petitioner's proposed logging in THP-237 would harm marbled murrelets using the forest for nesting and breeding.

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[12] The provisions of 50 C.F.R. § 17.3 (1994) were modified in 1981. 46 Fed. Reg. 54748 (1981). Prior to that time, "harm" was defined as follows:

> "Harm" in the definition of "take" in the Act means an act or omission *which actually injures or kills wildlife*, including acts which annoy it to such an extent as to significantly disrupt essential behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering; significant environmental modification which has such effects is included within the meaning of "harm."

50 C.F.R. § 17.3 (1975) (emphasis added). Thus, ever since 1975, habitat modification which "actually injures or kills [protected] wildlife" by significantly disrupting essential behavioral patterns including breeding has been part of the definition of "harm."

B. The Rulings Of The District And Circuit Courts Are A Correct Application Of The Harm Regulation And Are Consistent With Sweet Home.

The test of harm the district court applied is correct and fully consistent with *Sweet Home*. That actual death or injury is required for a section 9 violation, *Sweet Home*, 115 S.Ct. at 2410, n. 2, does not preclude issuance of an injunction to prohibit a *prospective* violation of the Act or require proof of a past violation before a prospective violation may be enjoined. Although this Court in *Sweet Home* said little about the timing of the injury necessary for injunctive relief, it did refer to the need to prevent (i.e., "avoid") harm that "will" occur if habitat is altered (i.e., future harm). The court stated:

> First, we assume respondents have no desire to harm either the red-cockaded woodpecker or the spotted owl; they merely wish to continue logging activities that would be entirely proper if not prohibited by the ESA. On the other hand, we must assume *arguendo* that those activities *will* have the effect, even though unintended, of detrimentally changing the natural habitat of both listed species and that, as a consequence, members of those species *will be killed or injured.*

Id. at 2412 (emphasis added). The Secretary of the Interior contended that the Act's prohibition on takings, which Congress defined to include harm, placed on respondents "a duty to avoid harm that habitat alteration *will* cause the birds unless respondents first obtain a permit pursuant to § 10." *Id.* (emphasis added). In sustaining the harm regulation, the Court impliedly approved of its application to proposed habitat modification that *will* cause death or injury to protected wildlife by significant impairment of their essential behavioral patterns. In the words of the circuit court, a "reasonably certain threat of imminent harm to a protected species is sufficient for the issuance of an injunction under section 9 of the ESA." Ap. 31a-32a.

Petitioner places great reliance for its strained construction of the regulation on language in *Sweet Home* where this

Court stated that "the Government cannot enforce the section 9 prohibition until an animal has actually been killed or injured." 115 S.Ct. at 2415. That statement occurred in a discussion of the differences between the authority of federal agencies to acquire land under section 5 of the Act and its authority to enforce section 9's prohibition against takings. Petitioner cites this statement as support for its view that habitat modification may not be enjoined absent proof that a protected animal has *already* been killed or injured. Petition for Certiorari at 11-13.

As the Ninth Circuit correctly observed, the quoted language is dictum. The Court did not, in the quoted statement or elsewhere in its opinion, specifically discuss the nature of the evidentiary showing required for issuance of an injunction to prohibit habitat modification that harms protected wildlife. When the statement is considered out of context, it is unclear whether this Court meant, as petitioner contends, that the government cannot seek an *injunction* until an animal has actually been killed or injured or only that it cannot seek criminal *penalties* until that has happened. However, in context there is no doubt about the power to which the court was referring. Penalties may be sought by the government only after a protected animal has actually been killed or injured. It does not follow, however, that the government must wait for a death or injury before seeking to enjoin habitat modification that will actually kill or injure protected wildlife in the future. Such a conclusion is contrary to Congress' amendments to the Endangered Species Act in 1982, when it gave the government power to prevent *prospective* harm by enjoining imminent violations of the Act.

> "Injunctions provide greater opportunity to attempt resolution of conflicts *before* harm to a species occurs. . . . The ability to enjoin a violation of the Act rather than the ability only to prosecute a completed violation will better serve the interests of the public, the *potential* violator and the *potentially* harmed species."

S. Rep. 418, 97th Cong., 2d Sess. 24 (1982) (emphasis added).

As petitioner reads *Sweet Home*, the decision radically changes the effect of the Endangered Species Act, overruling *sub silentio* the leading prior Supreme Court case, *TVA v. Hill*, 437 U.S. 153, 172-73, 98 S. Ct. 2279, 57 L.Ed. 2d 117 (1978). Given the Supreme Court's favorable reference to and reliance on *Hill* in *Sweet Home*, such a result could not have been intended. In *Sweet Home*, the court stated:

> Second, the broad purpose of the ESA supports the Secretary's decision to extend protection against activities that cause the precise harms Congress enacted the statute to avoid. In *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978), we described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. *Id.*, at 180, 98 S.Ct., at 2294 . . . As stated in § 2 of the Act, among its central purposes is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . " 16 U.S.C. § 1531(b).
>
> In *Hill*, we construed § 7 as precluding the completion of the Tellico Dam because of the *predicted* impact on the survival of the snail darter- . . . Both our holding and the language in our opinion stressed the importance of the statutory policy. "The plain intent of Congress in enacting this statute," we recognized, "was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policy of the Act, but in literally every section of the statute." . . . Although the § 9 prohibition was not at issue in *Hill*, we took note of that prohibition, placing particular emphasis on the Secretary's inclusion of habitat modification in his definition of "harm." In light of that provision for habitat protection, we could "not understand how TVA *intends* to operate Tellico Dam without 'harming' the snail

> darter." . . . Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's "harm" regulation.

Sweet Home, 115 S.Ct. at 2413-14 (emphasis added; footnotes and some citations omitted). If proposed habitat modification that will harm protected wildlife cannot be enjoined until it has already killed or injured a protected animal, in many instances the harm to wildlife will have occurred before the data can be gathered to show that it has occurred and hence needs to be stopped. Such an outcome is totally contrary to the "plain intent of Congress . . . to halt and reverse the trend toward species extinction, whatever the cost." *Id.*

Even on petitioner's interpretation of the evidentiary showing required to enjoin habitat modification that threatens imminent harm to protected wildlife, respondents presented the necessary proof. Commercial logging of more than 96% of its nesting habitat has reduced the California population of marbled murrelets from 60,000 to 5,000. Finding 13, Ap. 45a; Finding 14, Ap. 46a. As a result, the California population is listed as an endangered species under the state's Endangered Species Act and as a threatened species under the federal act. Furthermore, petitioner's surreptitious logging operation in THP-237 in mid-June, 1992, actually injured marbled murrelets using the stand for nesting by significantly impairing an essential behavioral pattern of those birds. *See* section II, B, *supra*. The dramatic drop in the detection of marbled murrelets in the stand immediately after the logging clearly establishes the existence of past harm and actual injury to murrelets nesting in Owl Creek, i.e., significant impairment of their ability to breed. *Id.* So, even on petitioner's own test, issuance of the injunction was proper.

III. PETITIONER IS BARRED FROM ASSERTING A DAUBERT CHALLENGE TO THE SUFFICIENCY OF RESPONDENTS' SCIENTIFIC EVIDENCE.

Prior to trial, petitioner asserted *Daubert* objections to respondents' scientific evidence. The district court did not rule on those objections, and petitioner did not request a ruling. As a result, respondents' scientific evidence was admitted without objection. Despite this fact, petitioner contended in the circuit court that respondents' scientific evidence was insufficient to support the district court's finding of future harm because, as measured by the standards of *Daubert*, that evidence was irrelevant, speculative and of no probative value. The circuit court held, correctly, that petitioner had waived its right to have the reliability of respondents' scientific evidence reviewed under *Daubert* standards by its failure to obtain a ruling on its *Daubert* objections to the admissibility of that evidence.

The effect of petitioner's failure to obtain a ruling from the trial court on its *Daubert* objections is similar to that of a party who fails to object to the admissibility of hearsay testimony during trial. The opponent of hearsay testimony admitted without objection may contend on appeal that the testimony is insufficient to support a critical factual finding, and its weight can then be determined under the familiar rule of whether the finding is clearly erroneous in light of the evidence as a whole. However, the opponent may *not* argue on appeal that the testimony is insufficient because it could not properly be considered for the truth of the matter asserted. That contention was waived by the failure to object to the admissibility of the testimony at trial.

In *Daubert*, this Court did not define a standard for determining the sufficiency of expert scientific testimony. Rather, it "determine[d] the standard for *admitting* expert scientific testimony in a federal trial," 509 U.S at 582 (emphasis supplied), and what the role of the trial judge is when scientific evidence is offered:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset,

> pursuant to Rule 104 (a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test.

509 U.S at 592-3 (footnotes omitted). By failing to obtain a ruling on its pre-trial objections to the testimony of respondents' experts, petitioner waived the right to challenge the sufficiency of the testimony, after it was admitted, that it was unreliable and irrelevant under *Daubert* standards.

Petitioner states:

> The Ninth Circuit agreed with the basic premise that scientific evidence that is unreliable and irrelevant under *Daubert* is necessarily insufficient to support a judgment. Appx. A., p. 15a. However, the court avoided its duty to analyze the weight of EPIC's purported scientific evidence by creating the novel rule that, by failing to obtain a ruling on objections to the *admissibility* of unreliable and irrelevant evidence, a party waives *all* arguments pertaining to it, including the objection that the evidence is *insufficient* as a matter of law to support the judgment. Appx. A, pp. 15a-16a. Thus, according to the Ninth Circuit, irrelevant evidence that is nothing more than "subjective belief or unsupported speculation" (509 U.S. at 590) *can* support a judgment if a party fails to obtain a ruling on an objection to its admissibility.

Petition for Certiorari at 18 (emphasis in original; footnote omitted). This assertion is incorrect in several respects. First, petitioner simply asserts – as though there had been findings – that respondents' scientific evidence is in fact unreliable,

irrelevant, and without probative value. Because no such findings were made, petitioner begs questions that could have been resolved if it had obtained a ruling on its pre-trial *Daubert* objection. In any event, respondents' four experts – Kim Nelson, Ken Moore, Esther Burkett and Harry Carter – are highly competent scientists whose professional accomplishments include field work, research and publications on the murrelet *that were developed completely independent of the litigation.*[13] *See Daubert*, 509 U.S. at 592-93.

Second, the circuit court did not create "the novel rule" petitioner attributes to it. The Ninth Circuit did not hold that a failure to obtain a ruling to objections to the admissibility of

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[13] Kim Nelson has spent 100% of her time doing research on marbled murrelets at Oregon State University since 1988. RT 243. Chair of the Marbled Murrelet Technical Committee of the Pacific Seabird Group for several years, RT 244, she is one of the authors of the PSG Protocol for marbled murrelets. RT 246, 264.

Ken Moore is the lead biologist for the California Department of Fish and Game and has performed 100 – 150 timber harvest reviews making determinations as to when they will affect the marbled murrelet. RT 580; RT 582:13-583:1; 584:4-8.

Esther Burkett is a biologist with the California Department of Fish and Game, RT 890:14-17, DFG's technical advisor to the USFWS Marbled Murrelet Recovery Team, RT 892:2-9; Exhibit 139, and the Department's representative to the US Forest Service Conservation Assessment for the marbled murrelet. RT 892:12-893:4 She began and maintains the California marbled murrelet database, RT 893:5-21, which is the most complete record of murrelet occurrences in the state. RT 942:19-943:5; Exhibit 304, RT 944-950.

Harry Carter is a biologist who testified for respondents about the population dynamics of the marbled murrelet. Mr. Carter has done research on the murrelet for 20 years, RT 67, including Sealy and Carter 1984 which "was the first main publication that forecast the seriousness of the loss of old growth forest to murrelets." RT 71:12-19. In 1988 he coauthored "*The Population Status and Conservation Problems of the Marbled Murrelet in California*" at the request of the California Department of Fish & Game. He is one of 6 members of the US Fish & Wildlife Service' Marbled Murrelet Recovery Team whose job is to come up with a recovery plan for the species. RT 79:1-10.

evidence waives *all* arguments to it. Nor did it hold that such a failure waives the objection that the evidence is insufficient as a matter of law to support the judgment. The circuit court held only that a party who fails to object to the admission of scientific evidence under *Daubert* may not thereafter argue on appeal that the evidence is insufficient under *Daubert*. *That* holding is correct, and it does not preclude a contention on appeal that the evidence is, for other reasons, unreliable, irrelevant or insufficient as a matter of law. The circuit court in fact considered and rejected petitioner's non-*Daubert* challenges to the sufficiency of the evidence. Ap. A at 17a-18a. It ruled there was no clear error in the district court's findings that marbled murrelets were nesting Owl Creek and that there was a reasonable certainty of imminent harm to them from petitioner's proposed logging operation. Petitioner does not seek review of those rulings in this Court.

Third, the circuit court did *not* rule, hold, state, suggest or imply that irrelevant evidence which is nothing more than subjective belief or unsupported speculation can support a judgment if a party fails to obtain a ruling on an objection to its admissibility. Rather, the circuit court *declined* to rule on petitioner's claims that, under *Daubert*, the evidence was irrelevant, nothing more than subjective belief or unsupported speculation, and without probative value.

Finally, petitioner claims that the ruling below conflicts with the rule followed in other circuits. There is, however, no conflict. As opposed to the ruling which petitioner erroneously attributes to the circuit court, the Ninth Circuit's *actual* ruling does not conflict with any of the circuit decisions cited by petitioner. Moreover, no circuit court has held that a party who fails to obtain a ruling on *Daubert* objections to the admissibility of scientific evidence may reassert those objections on appeal in the guise of an argument that the evidence is legally insufficient to support the judgment. *Daubert* defined standards for determining whether scientific evidence is admissible, not whether it is sufficient to support a verdict or a judgment. On this point, the decision of the Ninth Circuit is in complete accord with the rulings of the three circuit courts that have considered the issue.

In *Joiner v. General Elec. Co.*, 78 F.3d 524, 534-35 (11th Cir. 1996), Judge Birch, concurring, stated:

> The role of the trial judge, properly following the *Daubert* mandate, is to ensure that the conclusions reached by the scientific experts have some minimal level of reliability and probative value. This determination is accomplished by establishing that the predicate principles and methodology relied upon by the experts are valid and that they can be applied to the facts at issue. The *sufficiency* of the evidence and the *weight* of the evidence, however, are beyond the scope of the *Daubert* analysis. Whether the conclusions advanced from the stated premises in fact follow and the persuasiveness of those conclusions in the ultimate resolution of competing opinions, are questions appropriately left to the finder of fact.

See also, In re Joint Eastern & Southern Dist. Asbestos Lit., 52 F.3d 1124, 1132-33 (2d Cir. 1995) (admissibility and sufficiency determinations are not functionally equivalent under *Daubert*; *Daubert* did not alter traditional standards for assessing the sufficiency of scientific evidence); *Thomas v. American Cyanamid Company*, 7 F.3d 235, 1993 WL 369129 (6th Cir. 1993) (unpublished opinion) (because *Daubert* focuses on the admissibility of expert evidence, not its sufficiency, a trial court's ruling that plaintiff's expert medical evidence was insufficient to create a factual issue about the cause of her injuries was not inconsistent with *Daubert*).

Far from being "truly aberrational," Petition for Certiorari at 20, the holding of the Ninth Circuit is in accord with similar holdings from other circuits. It is also correct.

CONCLUSION

For the reasons stated, this Court should deny the petition for writ of certiorari.

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